INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Dec 09 2024
12:04PM EST
Transaction ID 75172426

No. 24-ICA-340

AMERIPRISE FINANCIAL, INC.,
Third-Party Defendant Below, Petitioner

v.

CHARLES E. VALLANDINGHAM,
Third-Party Plaintiff Below, Respondent.

Honorable Jennifer F. Bailey, Judge
Circuit Court of Kanawha County
Civil Action No. 10-C-221

REPLY BRIEF OF THE PETITIONER

Counsel for Petitioners

Ancil G. Ramey
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
T: 304.526.8133
F: 304.933.8738
ancil.ramey@steptoe-johnson.com

Edward P. Tiffey
WV Bar No. 6042
Tiffey Law Practice, PLLC
205 Capitol Street, 4th Floor
P.O. Box 3785
Charleston, WV 25337-3785
T: 304.344.3200
F: 304.344.9919
ed@tiffeylaw.com

Counsel for Respondent

Marvin W. Masters
WV Bar No. 2359
Kelly Elswick-Hall
WV Bar No. 6578
The Masters Law Firm LC
181 Summers Street
Charleston, WV 25301
T: 304.342.3106
F: 304.342.3189
mwm@themasterslawfirm.com
keh@themasterslawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER

I. STATEMENT OF THE CASE

The Statement of the Case by the Respondent, Charles E. Vallandingham ("Vallandingham"), makes many assertions without reference to the record or the applicable law because there is no support. For example, faced with the fact that his sole claim for fraudulent concealment fails because the Petitioner, Ameriprise Financial, Inc. ("Ameriprise"), as a franchisor, owed no duty to Vallandingham as a franchisee, Vallandingham attempts to rehabilitate his $1.3 million judgment by arguing that he alternatively presented an "affirmative fraud" claim.[1]

First, the Court will look in vain through the 3,394-page appendix for a single reference to "affirmative fraud" or "actual fraud" because there is none. *Second*, the Court will look in vain for any claim of "fraud" in any complaint filed by Vallandingham, a point which Ameriprise raised, and trial court conceded."[2] *Finally*, because Vallandingham had no evidence to support an affirmative fraud claim, he presented only evidence of fraudulent concealment[3] because *that was the claim that was tried*: "[O]ur belief is that this intentional *concealment* and that intentional *concealment* justifies an award to Mr. Vallandingham …"[4]

---

[1] Respondent's Brief at 1, 12, 32, 35.

[2] App. 773 ("what the plaintiffs want to do today in terms of this fraud – which, for the record, is not pled specifically in the … amended third party complaint."); App. 825 ("We're talking about this Court is allowing Mr. Vallandingham to pursue his fraud claim, notwithstanding his pleadings to the contrary."). Indeed, the trial court acknowledged this. App. 848 ("I know you keep talking about the pleadings, but we have very liberal rules in West Virginia, and I'll just put that on the record, too, that I've allowed the amendment of pleadings during trial."). Vallandingham's amended third-party complaint contained four counts: (1) "COUNT I -- VIOLATION OF NASD CONDUCT RULE," (2) "COUNT II – NEGLIENCE," (3) "COUNT III – BREACH OF CONTRACT," and "COUNT IV – UNJUST ENRICHMENT." App. 94-97. No separate count was outlined in the amended third-party complaint for fraud, a point Vallandingham now only disputes on appeal.

[3] App. 819 ("They never told them that because they were getting the monthly premium in and commissions off of it. So that goes directly into the fraud."); App. 824 ("under the fraud theory espoused by Mr. Vallandingham, the only things that he could've possibly known per his fraud theory, would be matters that transpired and precede the March 10, 2009 transaction."); App. 825 ("And as the spreadsheet shows, there are six entries only that pre-date the transaction. So we believe for purposes of Mr. Vallandigham adjudicating his fraud claim that that's the appropriate evidence to be considered.").

[4] App. 871-872 (emphasis supplied).

This explains why, in the trial court's judgment, the decision turned not only any affirmatively and knowingly false statement of fact which Ameriprise's employee, William C. Cupach ("Cupach"), made to Vallandingham to defraud him for the benefit of Ameriprise and to the detriment of Vallandingham, *but Cupach's failure to disclose negative information allegedly within Cupach's knowledge* regarding the book of business of Kenneth Beck ("Beck") that Vallandingham was indirectly acquiring.[5] Another confirmation that Vallandingham's case was predicated solely on a fraudulent concealment claim is revealed in his discussion of Ameriprise's objection to evidence that either (1) existed before the Beck sales transaction but was outside Cupach's knowledge or (2) did not exist until after the Beck sales transaction and could not have been within Cupach's knowledge. A couple of points are relevant here.

First, Vallandingham does not dispute that the only Ameriprise management person with whom he interacted was Cupach. Thus, he could not have been defrauded by anything other than his single interaction with Cupach on a telephone call.

Second, relative to that interaction and Ameriprise's objections to pre- and post-transaction events outside Cupach's knowledge, Vallandingham states:

> The Circuit Court was correct … The evidence defendant claims was "post-transaction" … *the defendant knew of and was actively investigating* prior to the sale … *and should have disclosed to the plaintiff* … Therefore, all of the evidence considered was relevant to defendant's knowledge of problems *and its failure to disclose and concealment of that information* … The supposed "post transaction matters" … were all relevant to and related to pre-sale problems with the book of

[5] App. 3075 ("Vallandingham called … Cupach … to ask if Beck was 'really' being terminated for not selling five financial plans. Cupach confirmed that it was the reason. … Vallandingham then asked Cupach whether there was a letter of termination that he could review, and Cupach replied that there was a letter, but if he wanted to see it, he would have to ask Beck for permission to review it. Vallandingham confirmed he understood and then asked, 'Is there anything else I need to know regarding this transaction?' to which Cupach replied, 'No.'"); App. 3089 ("Mr. McGinnis … testified that Ameriprise should have advised Mr. Vallandingham of the problems embedded in Beck's book of business …"); Respondent's Brief at 23 ("This is relevant because Cupach did not disclose these problems to plaintiff when he asked if there was anything else he needed to know."). Cupach's failure to disclose information that Vallandingham concedes was confidential formed the sole basis of Vallandingham's fraudulent concealment claim.

> business of which defendant was aware, *but failed to disclose, report, or tell the plaintiff*.[6]

Setting aside that this is inaccurate as much of the evidence, as will be discussed, was unknown to Cupach before the Beck transaction,[7] It underscores that Vallandingham's entire case revolved around Ameriprise's *failure to disclose* information about the Beck book of business.

Because this is the case that was presented to the trial court, Vallandingham's brief attempts to overcome the applicable law and the indisputable evidence that no fiduciary relationship exists between a franchisor and a franchisee, giving rise to a duty to disclose, in various ways. "[Cupach's] job was to help the plaintiff to grow his business. This created a relationship of trust between plaintiff and Cupach."[8] "Plaintiff stated that he trusted Ameriprise and, if there was something wrong with Beck's book of business that they knew about, defendant would advise him of it."[9] "Plaintiff is entitled to rely upon the representations of the defendant[10] and does not have to do further investigation."[11]

Vallandingham offers various excuses for failing to perform the recommended due diligence before consummating the Beck transaction. For example, he only communicated with

---

[6] Respondent's Brief at 1 (first emphasis in original, remaining emphasis supplied).

[7] One example of this can be found in Vallandingham's brief, which extensively discusses Sean Bradford's knowledge, with whom Vallandingham had no interactions relative to the Beck transaction. *Id.* at 7-8. As he did at trial, Vallandingham then takes this alleged corporate knowledge and extrapolates it into some general duty on the part of Ameriprise to disclose any issues relative to Beck's book of business: "Thus, *defendant* knew of problems prior to the sale of the Beck book of business to plaintiff, *but the defendant did not tell him about it*." *Id.* at 8 (emphasis supplied). Another example in Vallandingham's brief is a discussion of Kia Thomas's and an extensive discussion of Jeff Helms's knowledge, *id.* at 8-10, none of which does Vallandingham ever connect with Cupach, the only Ameriprise representative with whom he interacted relative to the Beck transaction.

[8] *Id.* at 4.

[9] *Id.* at 13.

[10] Of course, there was no evidence that Ameriprise made any representations other than Cupach's negative alleged response to the question of whether there was anything else that Vallandingham needed to know.

[11] Respondent's Brief at 13 n.12. Of course, this is simply wrong as a legal proposition.

Cupach, who was not on the compliance side but on the franchise side[12] and claims that there was no evidence that he could have secured Beck's compliance history when the evidence was to the contrary. On the contrary, just as he obtained Beck's termination letter, he could have obtained Beck's compliance history with Beck's consent.[13] Similarly, Vallandingham parses words when stating, "This also eviscerates [the] defense argument about questions to ask in the Acquisition Manual[14] that was supposedly 'available' to the plaintiff."[15] *First,* Vallandingham never disputed access to the manual at trial, and his franchise agreement stipulated his compliance with the standards outlined in Ameriprise's manuals.[16] *Second*, he relied on contractual provisions referencing thirty days for Ameriprise to approve or reject the proposed transaction,[17] arguing because less was taken, it constituted evidence that Ameriprise "rushed" to approve it.[18]

The rest of Vallandingham's Statement of the Case references irrelevant evidence that should never have been admitted or considered as it had nothing to do with Cupach's knowledge.

---

[12] App. 587, App. 963 ("Our compliance department and our officers that run our compliance department that train us."), App. 966 ("Brigit Sproles is responsible for service delivery and Curt Loughren responsible for compliance."), App. 1365-1366 ("did you have a supervisor or anyone that oversaw your compliance with state and federal laws? … it was a gentleman, Sean Bradford."), App. 1409 ("My current position is a senior compliance analyst in the complaints department.").

[13] App. 1426 ("The compliance history is not available for advisors to look other advisors … However, they can – if there's a need, they can request that from the advisor they're looking at …"), App. 1441 ("The advisor can request of the other advisor to know … their compliance history."). Even Vallandingham's expert agreed "that registered representatives who work for broker-dealers either as employees or franchisees, *in the case of Mr. Vallandingham*, everybody has a compliance history of some kind." App. 1794.

[14] App. 1952, App. 1954 ("This manual is designed to help P2 Advisors … understand the process for transferring a P2 practice from one advisor to another P2 Advisor …").

[15] Respondent's Brief at 13.

[16] App. 141 ("Independent Advisor agrees … To maintain … compliance standards consistent with the standards set forth in … the Manuals …."), App. 147 ("To promote the highest standards … AEFA has prepared Confidential Operations Manuals … setting forth the minimum standards …").

[17] App. 153 ("Independent Advisor agrees to notify AEFA in writing of any proposed transfer … at least thirty (30) days before such transfer is proposed to take place.").

[18] App. 1628 ("It has the appearance of being rushed."); Respondent's Brief at 15 ("the sale was approved in 1-2 days when the average is generally 30 days.") (emphasis omitted).

II. ARGUMENT

A. THE CIRCUIT COURT ERRED BY FAILING TO ENTER A FRAUDULENT CONCEALMENT JUDGMENT DESPITE RULING THERE WAS NO DUTY TO DISCLOSE BETWEEN A FRANCHISOR AND A FRANCHISEE.

As noted in the Petitioner's opening brief, the Circuit Court's rulings are *irreconcilably inconsistent*. On the one hand, it concluded that *Ameriprise owed no duty of disclosure to Vallandingham,*[19] but on the other hand, it *entered a $1.3 million judgment against Ameriprise for fraudulent concealment*. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it."[20] "[I]n order to prevail the plaintiff must bear the burden of showing by clear and decisive proof; (a) that the defendant made representations which were material, and that they were false; (b) *that when he made them, he knew they were false, or made them recklessly and as positive assertions, and not as mere opinions*; (c) that he made them with the intention that they should be acted upon by plaintiff; (d) that plaintiff believed these representations and acted and relied upon them; (e) that plaintiff thereby suffered injury."[21]

As noted, there was no evidence that Ameriprise knowingly and affirmatively made a materially fraudulent statement to Vallandingham, intending that he rely upon it. Instead, his

---

[19] In his brief, Vallandingham attempts to rewrite the trial court's order, stating, "Though Cupach and Ameriprise were under no duty to disclose confidential information contained in Beck's internal compliance file …" Respondent's Brief at 38. *First*, Cupach's one-word response, "No," to the question, "Is there anything I need to know regarding this transaction?" is not an affirmative misrepresentation of fact based on the record evidence, and Vallandingham cites no legal authority supporting that argument. *Second*, citing no authority contradicting Ameriprise's argument that there is no duty to disclose arising from a franchisor/franchisee relationship, Vallandingham's contention that "When one voluntarily discloses information, he has a duty to the whole truth rather than making a partial disclosure," Respondent's Brief at 39, has no applicable here as Cupach voluntarily disclosed no information, but merely responded "no" to a question "regarding this transaction."

[20] Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

[21] *Jones v. McComas*, 92 W. Va. 596, 602, 115 S.E. 456, 458 (1922) (emphasis supplied).

theory is based solely on Cupach's alleged failure to share information voluntarily (1) that he had no legal obligation to share, (2) that he was prohibited from sharing without Beck's consent, and (3) that Vallandingham could have ascertained by a reasonable inquiry.

"Fraudulent concealment," as noted in Ameriprise's opening brief, "involves the concealment of facts by one with knowledge or the means of knowledge, *and a duty to disclose*, coupled with an intention to mislead or defraud."[22] Critically, "For plaintiffs to recover damages for fraudulent concealment, plaintiffs must demonstrate that defendant *took some action affirmative in nature* designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry."[23]

Moreover, where someone, like Vallandingham, performs their own "independent investigation" of facts that are "easily ascertainable," they "cannot later complain of detrimentally relying upon fraudulent misrepresentations or concealment by the defendant."[24] For example, when a party "undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller."[25] Applying these standards to the evidence establishes Ameriprise's entitlement to judgment.

Faced with this, Vallandingham now attempts to change his theory of recovery on appeal: "Even if were correct that defendant had no duty to disclose the investigation, which it is not, they

---

[22] *Trafalgar House Constr. v. Zmm, Inc*., 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002) (emphasis supplied).

[23] *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (1998) (emphasis supplied, and quotation marks and citation omitted).

[24] *Trafalgar, supra* at 584, 567 S.E.2d at 300.

[25] Syl. pt. 5, *Jones, supra* note 5; *see also* Syl. pt. 5, *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996).

can't affirmatively lead the plaintiff to believe there are no other issues and tell him there is nothing more he needs to know about it, because it's not true."[26] However, the cases upon which Vallandingham relies do not support the proposition that Cupach's one-word response, "No," to the question, "Is there anything I need to know regarding this transaction?"[27] is alone sufficient to support a claim for actual affirmative fraud.[28]

Vallandingham first references the statement, "[A]n action for fraud can arise by the concealment of truth" from *Teter v. Old Colony Co*., 190 W. Va. 711, 717, 441 S.E.2d 727, 734 (1994),[29] but *Teter* undermines, rather than supports, Vallandingham's claims. In *Teter*, the purchasers of a home were affirmatively told by the seller that a structural engineering report had confirmed no problem with a retaining wall, of which the purchasers had expressed concern. A few years later, the retaining wall failed, and the purchasers sued the engineering firm and broker. *First*, unlike the present case, where even the trial court recognized there was no duty of disclosure, the Court held, "As a licensed professional, a broker is obligated to deal fairly with the purchaser."[30] *Second*, and more significantly, even though the Court held that the broker had duties to the buyers, it set aside a verdict against the broker without knowledge of any defect.[31] *Finally*, regarding the engineering firm, the sellers' theory was negligence,[32] not fraud. Accordingly, *Teter*

---

[26] Respondent's Brief at 26 (emphasis omitted). Go to Respondent's Brief at 34. The rest is irrelevant.

[27] App. 1474.

[28] It is worth noting precisely the question Vallandingham posed to Cupach: "Is there anything I need to know *regarding this transaction*?" Id. (emphasis supplied). Vallandingham did not ask Cupach if he needed to know anything about Beck or Beck's book of business. Instead, in a conversation Cupach could not even recall at trial, App. 1162 ("I don't remember having that conversation. Not saying it didn't happen, but I don't remember having one"), Vallandingham's question went to the "transaction."

[29] Respondent's Brief at 35.

[30] *Teter, supra* at 718, 441 S.E.2d at 735.

[31] *Id.* at 727, 441 S.E.2d at 744.

[32] *Id.* at 716, 441 S.E.2d at 733.

provides no support for Vallandingham's claims in this case.

Vallandingham next references, "[F]raud is the concealment of the truth, just as much as it is the utterance of a falsehood," from *Kessell v. Leavitt*,[33] but as with *Teter*, *Kessell* undermines, rather than supports Vallandingham's claims. In *Kessell*, a biological father sued a biological mother, her family, and her attorney for fraud and tortious interference after they placed his child up for a Canadian adoption without his consent. As with *Teter*, and unlike the present case, the father's ability to maintain an action for fraud turned on defendants' duty to disclose the whereabouts of his child: "defendants had a duty not to conceal from him the whereabouts of his son."[34] Indeed, it is why the *Kessell* court quoted the holding in *Stanley v. Sewell Coal Co*., 169 W. Va. 72, 76, 285 S.E.2d 679, 682 (1981) (emphasis supplied), "fraud has been defined as including all acts, omissions, and concealments *which involve a breach of legal duty, trust or confidence justly reposed*."[35] Where there is *a duty to disclose*,[36] a cause of action may be maintained for fraudulent concealment based on a violation of that duty, as in *Teter*, had the broker

---

[33] *Supra* note 6.

[34] *Id.* at 120, 511 S.E.2d 745.

[35] *Id.* at 127; 511 S.E.2d at 752.

[36] *See also Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 737 S.E.2d 640 (2012) ("concealment of the truth" only supported fraud verdict where there was "a duty to disclose" arising from lender/borrower relationship); *Smith v. First Cmty. Bancshares*, 212 W. Va. 809, 575 S.E.2d 419 (2002) ("concealment of the truth" where there was a "duty to disclosure" arising from a trustee/settlor relationship); *Thacker v. Tyree*, 171 W. Va. 110, 113, 297 S.E.2d 885, 888 (1982) ("where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the vendor has *a duty to disclose* the same to the purchaser") (emphasis supplied); *Frazier v. Brewer*, 52 W. Va. 306, 310, 43 S.E. 110, 111 (1902) ("Fraud is the concealment of the truth just as much as it is the utterance of a falsehood. If these appellants knew that the issuance of this additional stock was in violation of the agreement, had with James C. Frazier, and the facts and circumstances point to the fact that they were fully informed on the subject, and knew that he was paying a large price for the stock to gain a controlling interest, they were guilty of gross fraud in concealing from him the fact that they had issued to themselves the additional stock at par. In short they were taking advantage of his confidence and selling him a bogus brick. Not only is this true, but even if the appellants did not know these things in advance, as soon as they were made known to them even by this suit, *it was their duty* if they wished to escape the inference of fraud to have offered to rescind the sale, restore the purchaser his money and take back their stock.") (emphasis supplied).

known of defects it did not disclose, or in *Kessell*, where the defendants knew the whereabouts of the child but concealed it from the biological father. Where there is *no duty to disclose*, however, as in the instant case, a one-word response, "No," to the question, "Is there anything I need to know regarding this transaction?"[37] is insufficient to support a fraud claim.[38]

Just as he has conflated fraudulent misrepresentation and fraudulent concealment relative to a cause of action based on "concealment of the truth," Vallandingham similarly conflates the two regarding the issue of investigation, citing the statement in Syllabus Point 6, in part, of *Cordial v. Ernst & Youn*g,[39] "It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff." Of course, this holding applicable to fraudulent representation cases has nothing to do with the principle applicable to fraudulent concealment cases that "Though a purchaser may rely upon particular and positive representations of a seller, *yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry*, he will be deemed to have relied upon his own investigation and not upon the representations of the seller."[40] Here, Vallandingham conducted an investigation, including a

---

[37] App. 1474.

[38] Vallandingham also erects strawmen in his brief. For example, he discusses the principle that an as-is clause does not absolve a fraudster from liability. Respondent's Brief at 35-36. Ameriprise never argued anything to the contrary in its brief. Instead, it noted, "Although an 'as is' clause does not automatically relieve one from a claim of fraudulent concealment, where a party entered 'as is' transaction without a special relationship, they may not later claim it." Petitioner's Brief at 32, *citing Moore v. Pendavinji*, 2024 IL App (1st) 231305, 2024 Ill. App. LEXIS 2330 (rejecting a fraudulent concealment claim by "as is" purchaser of a used car in the absence of a fiduciary or special relationship); *ORO BRC4, LLC v. Silvertree Apts., Inc*., 2021 U.S. Dist. LEXIS 9235, 2021 WL 184686 (S.D. Ohio) (rejecting a fraudulent concealment claim by "as is" purchaser of four residential apartment communities in the absence of fiduciary or special relationship).

[39] *Supra* note 5.

[40] Syl. pt. 5, *Jones, supra* note 21. Indeed, in *Cordial*, the Court noted, "The representee who attempts investigation may have a right to rely upon the representations *where expert knowledge is necessary to an effectual investigation, which knowledge is possessed by the party making the representations, and not by the other*." *Cordial, supra* at 132-133, 483 S.E.2d at 261-262 (emphasis

telephone conversation with Cupach. Cupach did nothing to prevent Vallandingham from undertaking further investigation, including asking Beck about any compliance issues and for a copy of his compliance file. Thus, Vallandingham's fraud claims fail as a matter of law.

Similarly, Vallandingham's reliance on the principle that "One to whom a representation has been made as an inducement to enter into a contract has the right to rely upon it as true quoad the maker, without making inquiry or investigation to determine the truth thereof," from Syllabus Point 2 of *Staker v. Reese*, 82 W. Va. 764, 97 S.E. 641 (1918),[41] is misplaced where the Court held in Syllabus Point 4, "Where a director, who is the managing officer of a corporation, *with full knowledge* that negotiations are pending for a sale of the assets of such corporation which are reasonably certain of consummation, for the purpose of securing the stock of another director, *represents to him that there are no such negotiations pending or contemplated*…"[42] Again, Cupach never made any affirmatively false statement to Vallandingham. Accordingly, the trial court erred in denying Ameriprise's summary judgment motion, which this Court should set aside and remand with directions to entry judgment for Ameriprise.

B. THE CIRCUIT COURT ERRED BY CREDITING EVIDENCE REGARDING POST-TRANSACTION MATTERS, AN UNRELATED CLASS ACTION, FINRA RULES, EXPERT OPINION TESTIMONY, AND UNRELATED LITIGATION AND REGULATORY MATTERS, ALL IRRELEVANT TO THE FRAUDULENT CONCEALMENT CLAIM.

There is a reason Vallandingham devotes *only one page and twenty-two lines* of his brief to this assignment of error.[43] Again, the only Ameriprise representative with whom Vallandingham

---

supplied). Here, of course, no affirmative representations were made, no expert knowledge was necessary for a productive investigation, and Cupach had no expert knowledge that could not have become known upon a request by Vallandingham of Beck.

[41] Respondent's Brief at 37.

[42] Emphasis supplied. The same defect applies to Vallandingham's reliance on 37 Am. Jur. 2d, *Fraud & Deceit*, § 237, with identical language regarding an affirmative misrepresentation.

[43] Respondent's Brief at 42-43.

interacted *occurred in a single telephone call with Cupach*. If Cupach fraudulently concealed anything, it had to be *within his knowledge at the time of that conversation*.[44] For example, as noted, the Court set aside a fraud verdict against a real estate broker in *Teter* because any issues with the retaining wall were *unknown to the broker at the time of the sales transaction*.[45] Here, Vallandingham's case turned on Cupach's failure to disclose Beck's compliance history, but the evidence was undisputed that Cupach *never reviewed Beck's compliance file as it was outside his job responsibilities*.[46] Likewise, even though the trial court admitted the evidence over Ameriprise's objections, Cupach testified that he was unaware when he spoke to Vallandingham that Beck had been reprimanded due to a transaction with Elizabeth Clark as it was before his involvement and outside his responsibilities.[47] Cupach was unaware that Beck received a $2,000 fine when he spoke to Vallandingham, as it was before his involvement and outside his responsibilities.[48] Cupach was unaware of transactions involving Martha Callaway and Susan Stanley because "my time of taking this over was after the fact."[49] Relative to a deficiency letter sent by Sam Bradford to Beck dated March 4, 2008, Cupach testified, "I haven't seen this before."[50] Cupach further testified that he was unaware of an alleged forgery involving Beck when he spoke with Vallandingham.[51] As Cupach explained, the information Vallandingham complains was withheld from him was not in Cupach's knowledge because either it happened before his

[44] *Barfield v. Hall Realty, Inc*., 232 P.3d 286, 292–293 (Colo. Ct. App. 2010) (transactional broker only had a duty to disclose material facts of which it was actually aware).

[45] *Teter, supra.* at 727, 441 S.E.2d at 744.

[46] App. 1065.

[47] App. 1085.

[48] App. 1087.

[49] App. 1099.

[50] App. 1102.

[51] App. 1173 ("I personally was not."). Likewise, when asked about a 2001 class action settlement which the trial court erroneously allowed into evidence, Cupach testified that it was "seven years before my time." App. 1175.

involvement, it was outside his responsibilities, or the documents he was shown were "not kept in my office."[52] Indeed, all Cupach knew was contained in "the last letter that was given to Mr. Beck" on "April 14, 2008," which he described as "a letter of caution."[53] As far as Cupach knew, as he testified, "there was no other discipline according to my records here that was given."[54] Finally, Cupach confirmed that "the sole ground for termination for Mr. Beck was for the failure to deliver, according to the franchise agreement, his financial planning requirement. That was the grounds for termination."[55]

It is also not insignificant that (1) Gary Gassman, not Cupach, was responsible for reviewing and approving the proposed sale of Beck's book of business[56] and (2) Cupach understood that "Marc Arnold was the acquirer,"[57] not Vallandingham. From Cupach's perspective and limited role, what Vallandingham needed to "know regarding this transaction" was between Arnold and Vallandingham as "The consent was with Mr. Arnold."[58] Indeed, when Cupach had his single conversation with Vallandingham, he did not even know "if Mr. Vallandingham was going to take over 100 percent of the clients or not … That's between Mr. Vallandingham and Mr. Arnold to decide who's servicing which clients."[59]

So, confronted with a lack of evidence of Cupach's present knowledge of the information Vallandingham claimed was wrongfully withheld by Cupach's single-word response of "No,"

---

[52] App. 1104.

[53] App. 1108.

[54] *Id.*

[55] App. 1152.

[56] App. 1135. Indeed, Gassman, not Cupach, signed off on the sale. App. 1163.

[57] App. 1140.

[58] *Id.*

[59] App. 1141-1142; *see also* App. 1165 ("I was not aware of the servicing arrangement component of who was going to be doing what, of who was going to be servicing the book, no. … Why would I care who services the clients? The book is being sold to Mr. Arnold. What Mr. Arnold and Mr. Vallandingham decide to do with those clients and who's going to be the servicing advisor is up to them.").

Vallandingham sought, and the trial court permitted not only the imputation of *Ameriprise's corporate knowledge of Beck's issues at the time to Cupach*, but issues that came to Ameriprise's attention after the Beck transaction, erroneously admitting, considering, and crediting evidence having nothing to do with Cupach's present knowledge at the time of his conversation with Vallandingham. This allowed Vallandingham to effectively prosecute a negligent supervision claim against Ameriprise vis-à-vis the entirely different relationship and duties between Ameriprise and its advisors' customers, and which did not come to light until well after the Beck transaction, much of which found its way into the trial court's decision, including (1) "NASD and FINRA set industry standards and regulations that apply to Ameriprise's dealings *with its clients*,"[60] (2) "Ameriprise adopted its own Code of Conduct, which outlines Ameriprise's … duties as a broker-dealer … [in] providing *customer service*,"[61] (3) "a continuing duty to review and give advice *to their clients*,"[62] (4) "assure the products are suitable *for the client*,"[63] (5) "Vallandingham … noticed problems with Beck's client records,"[64] (6) "Ms. Dawson wanted to know if Vallandingham had the $500.00 she had loaned Beck,"[65] (7) "Mr. Kaczkowski decided not to continue paying the premium and let the policy lapse,"[66] (8) "Ameriprise has consistently used that *class action settlement* to state it has no further liability from a suitability standpoint,"[67] (9) "The Court takes judicial notice of these pleadings filed in … Civil Action No. 00-1980. A

[60] App. 3033 (emphasis supplied).

[61] *Id*. (emphasis supplied).

[62] App. 3034 (emphasis supplied).

[63] *Id*. (emphasis supplied).

[64] App. 3038.

[65] *Id.* This an excellent example of Vallandingham's throw spaghetti against the wall approach as there was no evidence that anyone at Ameriprise, including Cupach, knew of this or many of the other issues referenced in the trial court's decision.

[66] App. 3040. Again, there was no evidence that anyone at Ameriprise, including Cupach, were aware of Kaczowski.

[67] *Id.* (emphasis supplied).

review of these documents makes it abundantly clear that that … the only matter released … were acts taking place prior to the settlement,"[68] (10) "In Mr. McGinnis's professional opinion … a significant number of clients were kept in the same unsuitable product,"[69] (11) "Ameriprise … contacted Vallandingham and advised him that it was contrary to Ameriprise's policy to 'advise clients to write complaint letters,'"[70] (12) "As Vallandingham describes it, Ameriprise had a culture of 'they have got to find it on their own,"[71] (13) "Vallandingham made them [the Fischers] aware that their policies were no longer solvent,"[72] (14) "Mrs. Keller testified that she would not have purchased the policy if Beck had informed her of this risk,"[73] (15) "Vallandingham arranged a meeting with Ms. Watts … to explain the bad news that her life insurance was lapsing,"[74] (16) "The same sort of issues were present in Frieda and Jesse Hall's life insurance policies,"[75] and (17) "Beck client Lonnie Gribble complained to Vallandingham that Beck represented to him that he could access an annuity and take funds from it without penalty, which was not true."[76] Again, other than Kaczkowski, for whom Ameriprise reversed his annuity before the Vallandingham transaction,[77] *none of these issues were known to Cupach then*, and one cannot conceal information one does not possess.

What exacerbates the trial court's error in considering this post-transaction evidence is that

---

[68] App. 3040-3041.

[69] App. 3041.

[70] *Id.*

[71] App. 3042.

[72] *Id.* Significantly, the Fischers opted out of the class action and Ameriprise resolved their issues. App. 3043.

[73] App. 3044.

[74] *Id.*

[75] *Id.*

[76] App. 3045.

[77] App. 3046.

Ameriprise addressed not only Kaczkowski's issue, which included fining Beck $847,[78] but issues regarding Holt[79] and Clark.[80] Ameriprise also sent Beck a letter of reprimand and fined him $500 for failing to follow corporate policies.[81] This demonstrates that Ameriprise was actively supervising Beck and disciplining him where appropriate. Still, the trial court relied on McGinnis's testimony that because of Ameriprise's duties not to Vallandingham but to Beck's clients, "Ameriprise should have advised of the problems embedded in Beck's book of business,"[82] citing no legal authority and despite the trial court's opposite holding that Ameriprise, as a franchisor, owed no such legal duty to Vallandingham, a franchisee.

Critically, Ameriprise filed extensive motions in limine to exclude evidence entirely irrelevant to Vallandingham's fraudulent concealment claim or Ameriprise's defenses. Moreover, the trial court's erroneous denial of those motions in limine was prejudicial as it relied on that evidence in entering a $1.3 million judgment against Ameriprise.

> Under R. Evid. 401, "Irrelevant evidence is not admissible." It has been noted:
>
> > Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.[83]

Moreover, relative to the extensive R. Evid. 404(b) evidence considered by the trial court, this Court "review[s] *de novo* whether the trial court correctly found the evidence was admissible for

---

[78] App. 3047.

[79] *Id.* ("Beck was fined and received a reprimand by Ameriprise").

[80] *Id.* ("Ameriprise issued Beck a reprimand and fined him $2,000.00").

[81] App. 3050.

[82] *Id.*

[83] Syl. pt. 9, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

a legitimate purpose" and "review[s] for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403."[84] Finally, "The trial court has an obligation to all parties to ensure that the trial is conducted in a fair manner."[85] In this case, applying these standards, the trial court committed reversible error when it denied Ameriprise's motions in limine regarding the testimony of McGinnis,[86] other litigation and administrative actions,[87] FINRA reporting requirements,[88] unrelated class action litigation,[89] post-transaction compliance matters,[90] and post-transaction customer complaints.[91]

Although Vallandingham argued that this evidence was relevant to Ameriprise's potential motive for not violating its confidentiality agreement and volunteering Beck's compliance history even though Vallandingham never requested it despite being directed to do so in the Acquisition Manual, evidence of motive is irrelevant unless a causal nexus was established connecting Cupach's "no" response to Vallandingham's "Is there anything else I need to know regarding this transaction?" question.[92] The Court will search the record in vain for evidence connecting the testimony of McGinnis, other litigation and administrative actions, FINRA reporting requirements, unrelated class action litigation, post-transaction compliance matters, and post-transaction client

---

[84] *State v. LaRock*, 196 W. Va. 294, 310-311, 470 S.E.2d 613, 629-630 (1996).

[85] Syl. Pt. 3, in part, *State v. Delorenzo*, 247 W. Va. 707, 885 S.E.2d 645 (2022).

[86] App. 625.

[87] App. 635.

[88] App. 645.

[89] App. 648.

[90] App. 651.

[91] App. 654.

[92] *See, e.g., Wood v. United States*, 2018 U.S. Dist. LEXIS 29188, *20, 2018 WL 1037636 (D. Me. 2018) ("Any motive resulting in the making of a false representation for the purpose of gaining advantage by inducing another to act or rely upon it is sufficient."); *Hill v. United States DOL*, 65 F.3d 1331, 1337, 1995 U.S. App. LEXIS 27556, *16, 1995 FED App. 0296P (6th Cir.), 11, 11 I.E.R. Cas. (BNA) 16 (6th Cir. 1995) ("The critical question is not whether concealment of motives alone constitutes fraudulent concealment, but whether the defendant's alleged fraudulent conduct concealed from the plaintiff facts respecting the accrual or merits of the plaintiff's claim.") (citation omitted).

complaints to Cupach's "no" response. Indeed, most of it predated Cupach's involvement or post-dated his "no" response. Instead, the trial court allowed Vallandingham to tar-and-feather Ameriprise with this evidence to justify finding fraudulent concealment in the acknowledged absence of any fiduciary relationship and, therefore, any duty to disclose.

Accordingly, to the extent this Court does not remand for entry of judgment in favor of Ameriprise as a matter of law, the trial court's evidentiary rulings relative to these issues should be overturned, and the case should be remanded for new trial excluding evidence that is either irrelevant or whose probative value is far outweighed by its unfairly prejudicial effect.

C. THE CIRCUIT COURT ERRED BY AWARDING DAMAGES THAT WERE EXCESSIVE, SPECULATIVE, AND UNSUPPORTED BY COMPETENT EVIDENCE TO A REASONABLE DEGREE OF CERTAINTY AND BY AWARDING EMOTIONAL DISTRESS DAMAGES.

As with the evidentiary assignment of error, Vallandingham devotes little of his brief to the damages assignment of error,[93] citing only two cases – *Cell, Inc. v. Ranson Invs*., 189 W. Va. 13, 427 S.E.2d 447 (1992), relied upon by Ameriprise, and *Miller v. Miller*, 216 W. Va. 720, 613 S.E.2d 87 (2005), having no application to this case.

As noted in its opening brief, Ameriprise repeatedly moved to exclude Vallandingham's damages expert, including a motion in limine.[94] As pointed out in the motion and raised during the trial, the expert did not examine Beck's book of business, disregarded that Vallandingham paid nothing for the book, and ignored that Vallandingham voluntarily sold a portion of the book to another advisor. Under West Virginia law, damages for lost profits "must be established with reasonable certainty and not be speculative or conjectural in character or amount."[95] "Loss of profits cannot be based on estimates which amount to mere speculation and conjecture but must

[93] Respondent's Brief at 43-44.

[94] App. 630; *see also* App. 790-793.

[95] *Rubin Res., Inc. v. Morris*, 237 W. Va. 370, 379, 787 S.E.2d 641, 650 (2016).

be proved with reasonable certainty."[96] "A new business may recover lost profits in a breach of contract action, but only if the plaintiff establishes the lost profits with reasonable certainty; lost profits may not be granted if they are too remote or speculative."[97] "[D]amages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like."[98]

Here, Vallandingham offered no evidence that a single Beck account lost value after his purchase. As Ameriprise's expert testified, "There was no analysis in Mr. Dionne's work regarding the specific performance of the Beck Book."[99] The Beck customers who testified offered no evidence regarding any loss in value, and both were still Ameriprise customers when they testified at trial. Although they were available to him, the expert did not analyze Vallandingham's tax returns, claiming they would not be helpful because "there is a lot of passive income on his tax return like dividends and interest and things not relevant to the losses of a business,"[100] even though that income could be isolated. Instead, the expert's opinion was based solely on "peer data,"[101] ignoring direct and available evidence of Vallandingham's earnings and the financial performance of the Beck accounts post-acquisition. Moreover, much of it contradicted even relative to peer data instead of supporting the expert's conclusions. For example, in 2007 and 2008, Vallandingham, before the Beck purchase, Vallandingham underperformed his peers by 13% and 5%,

---

[96] Syl. pt. 5, *State ex rel. Shatzer v. Freeport Coal Company*, 144 W.Va. 178, 107 S.E.2d 503 (1959).

[97] Syl. pt. 2, *Cell, supra.*

[98] *Given v. Field*, 199 W. Va. 394, 398, 484 S.E.2d 647, 651 (1997) (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 352, cmt. b (1981)).

[99] App. 2882.

[100] App. 1902.

[101] App. 1857.

respectively.[102] In 2009, after the Beck purchase, Vallandingham outperformed his peers by 5%.[103] At the end of 2010, Vallandingham's expert conceded that he had "a substantial increase in earnings … for the end of calendar year 2009 to the end of calendar year 2010"[104] and "another increase in earnings from the end of calendar year 2010 to the end of calendar year 2011."[105]

Consistent with the applicable law relative to these cases, Ameriprise's expert testified that "the appropriate measure of damages is the difference in price between what Mr. Vallandingham paid and what he would have paid … had he known about the unfavorable activity … And the difference between those two measurement points equals the appropriate measure of economic damages in this case, and in my experience, all other transaction disputes."[106] Using that appropriate measure, Vallandingham's damages could not exceed $74,999, assuming he still would have offered $1 to Beck.[107] Moreover, as the expert explained, Vallandingham's earnings grew about $53,000 between 2008 and 2010, after he purchased Beck's business, which indicates "A successful transfer of the book of business."[108] "The general rule in actions for fraud and deceit is that one injured thereby is entitled to recover such damages as will compensate him for the loss or injury actually sustained, and as will place him in the same position that he would have occupied had he not been so defrauded."[109]

Vallandingham's argument that the trial court "was within its discretion as the finder of fact to determine that the lost profits assessment of Dionne better reflected the damages sustained

---

[102] App. 1858.

[103] *Id.*

[104] App. 1891-1892.

[105] App. 1892.

[106] App. 2876.

[107] App. 2877.

[108] App. 2880-2881.

[109] Syl. pt. 2, *Dunn v. Stump & Copenhaver*, 107 W. Va. 406, 148 S.E. 382 (1929).

by the plaintiff"[110] is unavailing where the damages award was contrary to law, just as a jury's verdict must be reversed under like circumstances.[111] Here, the trial court erred in awarding damages for lost profits, and, as in cases involving jury verdicts, that award should be set aside.

The trial court also erred in awarding $100,000 in emotional distress damages, which are not recoverable as a matter of law.[112] The *Miller* case, the Respondent's sole authority, has no application here. *Miller* was an equitable distribution case, not a civil action for fraud, arising from a wife's claim to a share of the proceeds of her husband's fraud suit against a car dealership. Not only did the *Miller* Court not hold that emotional distress damages are recoverable in a suit for fraudulent concealment, but the portion of the opinion cited in Respondent's brief was the husband's argument, which the Court rejected: "there is no evidence before this Court to suggest that Mr. Miller's contract fraud claim and resulting recovery should … be treated as separate property."[113] Thus, the $100,000 portion of the judgment order must be set aside.

III. CONCLUSION

Based on the record evidence, this Court should set aside the judgment and remand for entry of judgment as a matter of law for the Petitioner, Ameriprise Financial, Inc. Alternatively, this Court should set aside the judgment and remand for a new trial, excluding irrelevant evidence, limiting the award of damages to those established by a reasonable degree of certainty, and striking any claim for non-economic damages.

---

[110] Respondent's Brief at 44.

[111] *See, e.g., Shatzer, supra* note 95 (setting aside jury verdict for lost profits).

[112] *Walsh v. Ingersoll-Rand Co*., 656 F.2d 367, 371 (8th Cir. 1981) ("no recovery is allowed for mental suffering in fraud cases, absent physical injury, unless the tortfeasor acted willfully or maliciously"); *Zeigler v. Fisher-Price, Inc*., 261 F. Supp. 2d 1047 (N.D. Iowa 2003) (damages for emotional distress are not recoverable in a fraudulent concealment case).

[113] *Miller, supra* at 726, 613 S.E.2d at 93.

AMERIPRISE FINANCIAL, INC.

By Counsel:

Ancil G. Ramey
WV Bar No. 3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington WV 25722-2195
T: 304.526.8133
F: 304.933.8738
ancil.ramey@steptoe-johnson.com

Edward P. Tiffey
WV Bar No. 6042
Tiffey Law Practice, PLLC
205 Capitol Street, 4th Floor
P.O. Box 3785
Charleston, WV 25337-3785
T: 304.344.3200
F: 304.344.9919
ed@tiffeylaw.com

CERTIFICATE OF SERVICE

I certify that on December 9, 2024, I served the preceding "REPLY BRIEF OF THE PETITIONER" using the E-Filing system:

Marvin W. Masters
Kelly Elswick-Hall
The Masters Law Firm LC
181 Summers Street
Charleston, WV 25301
mwm@themasterslawfirm.com
keh@themasterslawfirm.com

Ancil G. Ramey (WV Bar #3013)